

IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,)	
Plaintiff,)	Criminal Case 03-467-A
)	
v.)	Hearing: March 23, 2005
)	
WILLIAM ELIOT HURWITZ,)	Senior Judge Leonard D. Wexler
Defendant.)	

GOVERNMENT'S AMENDED OPPOSITION TO DEFENDANT'S
MOTIONS PURSUANT TO FED. R. CRIM. P. 29, 33, AND 34

COMES NOW the United States of America, by and through its attorneys, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, Assistant U.S. Attorney Gene Rossi, and Assistant U.S. Attorney Mark D. Lytle, and hereby submits its amended opposition to the combined motions of defendant William Eliot Hurwitz ("Hurwitz"). The motions were made pursuant to Fed. R. Crim. P. 29, 33, and 34.¹

In sum, the defendant's motions should be denied because the evidence presented by the government at trial was overwhelming and supported the jury's conclusion that Hurwitz prescribed narcotics to individuals he knew were selling and abusing those controlled substances. Moreover, the defendant's own experts supported the conclusions of the government's experts, who testified that the prescriptions issued by Hurwitz and alleged in the indictment were not for a legitimate medical purpose and beyond the bounds of medicine. Thus, defendant's motions should

¹ The amended opposition corrects page 11 (line 7) of the original submission.

be denied by this Honorable Court.

BACKGROUND

On July 27, 2004, a federal grand jury sitting in the Eastern District of Virginia returned a true bill on a Second Superseding Indictment ("Indictment") charging Hurwitz with: conspiracy to distribute controlled substances (Count 1); drug trafficking resulting in death or serious bodily injury (Counts 2 through 6); substantive counts of drug distribution (Counts 7 through 59); operating a continuing criminal enterprise (Count 60); and health care fraud (Counts 61 and 62).

The charges contained in the Indictment alleged that from 1998 through the end of 2002, defendant Hurwitz operated a pain management practice in McLean, Virginia, within the Eastern District of Virginia, from which he wrote prescriptions for excessive quantities of controlled substances to patients located in 39 states, the District of Columbia and Canada. The Indictment specifically set forth prescriptions that the defendant issued to twenty-four patients, whose prescriptions were alleged to have been not for a legitimate medical purpose and outside the bounds of medicine. The Indictment alleged that many of these patients sold and/or abused the medications they received from the defendant in Northern and Southwestern Virginia, West Virginia, Tennessee, and Kentucky.

On December 15, 2004, after approximately six weeks of trial, testimony from seventy-six witnesses, the playing of recorded conversations between the defendant and three patients,

and over 1,000 exhibits admitted into evidence, the jury found Hurwitz guilty on fifty counts, not guilty on thirteen counts and "hung" on three counts.²

ISSUES

1. Whether any rational trier of fact, who views the evidence in the light most favorable to the government, could find the Hurwitz guilty of conspiracy to distribute controlled substances, substantive counts of distributing controlled substances, and drug trafficking resulting death and serious bodily injury.

2. Whether the interests of justice require a new trial because the guilty verdict was against the weight of the evidence.

3. Whether Congress has granted authority to the

² On December 16, 2004, the jury returned to deliberate and was unable to reach a verdict on the remaining three counts. At that time, the government and the defendant agreed to allow this Court to determine drug quantities as they relate to the defendant's sentencing issues as well as any outstanding forfeiture issues. The jury was then dismissed.

Attorney

General to enforce violations of the Controlled Substances Act,
when a physician is charged with violating it.

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FACTS

To assist this Court, the government has provided a brief summary below of the evidence admitted at trial.³ While there was an enormous amount of evidence submitted to the jury during the six weeks of trial in this case, the government will attempt to generally present evidence that it believes is relevant to the motions submitted by the defendant.

A. Patient Testimony.

At trial, the government presented the testimony of no fewer than sixteen patients of the defendant who testified that they received prescriptions for excessive quantities (up to 1,600 pills per day) of narcotics, despite Hurwitz' direct knowledge and/or blatant red flags of abuse and distribution, including, but not limited to:

1. Early refills of prescriptions sought by patients;
2. Frequent excuses by patients describing lost or stolen prescriptions;
3. Urine and blood tests conducted by Hurwitz that showed the patient tested positive for illicit narcotics (sign of abuse);
4. Urine and blood tests conducted by Hurwitz that

³ The government shall be filing simultaneously herewith a sentencing memo, which will be based in part on the facts set forth in this opposition. Pursuant to calculations under the advisory United States Sentencing Guidelines ("USSG"), Hurwitz should receive a sentence of life imprisonment (level 48): drug trafficking offenses resulting in both death and serious bodily injuries under USSG § 2D1.1(a)(2) (base offense level 38) and a combined drug quantity under USSG § 2D1.1(c) (base offense level 38); vulnerable victims under USSG § 3A1.1(b)(1) (increase two levels); obstructing or impeding the administration of justice under USSG § 3C1.1 (increase two levels); aggravating role under USSG § 3B1.1(a) (increase four levels); and abuse of position of trust under USSG § 3B1.3 (increase two levels).

- showed the patient tested negative for the medications prescribed (sign of diversion);
5. Track marks found on patients arms (indication of shooting up);
 6. Cocaine rashes on patient's skin;
 7. Patient self reports prior history of addiction; and
 8. Patient self reports arrest(s) for selling/distributing the medications prescribed by Hurwitz.

Many of these patients had pled guilty to distribution charges and were testifying consistent with a plea agreement that they had with the government. They testified that the defendant made it easy to get prescriptions for powerful narcotics like OxyContin, Percocet, and Dilaudid. A number of these patients testified that they frequently skipped office visits and were able to request prescriptions over the telephone and come after hours, during which they would pick up prescriptions at the security desk in the apartment building next to the defendant's office and even at the defendant's residence. These patients testified about how they sold the pills they received from the defendant's prescriptions and how they crushed the pills and snorted them or dissolved the pills in water and injected them into their veins for an immediate high. Many of these patients, after already having spent twenty months in jail, were able to show the track marks on their arms, from the witness stand, still clearly visible for all to see. During visits, Hurwitz saw patients Timothy Urbani and Bret McCarter with obvious ulcers the

size of a nickel and a quarter, respectively, on their arms from injections.

B. Patient Medical Records and Recorded Conversations.

Some of the most devastating evidence against the defendant lay in the patient medical records maintained by the defendant himself. These records proved that the defendant knew these patients were distributing and abusing their medications and, nevertheless, continued to issue prescriptions for excessive quantities of controlled substances.

1. Peter Tyskowski [Counts 1, 44, and 45].

The defendant wrote, in Tyskowski's 11/27/01 assessment note, that "Patient Reports that he was arrested on 11/18 on charges of `possession with intent to distribute' medications prescribed." [Gov't Ex. 119-21] Despite this knowledge, the defendant continued to issue potent prescriptions to Tyskowski. On March 29, 2002, the defendant wrote about Tyskowski: "He continues to deny use of cocaine, in spite of 3 positive tests over the last 4 months." [Gov't Ex. 119-33] Tyskowski got more narcotics on that day.

2. Peter Grant [Counts 1, 18, and 19].

On April 3, 2002, the defendant wrote "Notified by Detective Needles . . . that Mr. Grant was arrested and found to possess cocaine and needles for injection." [Gov't Ex. 104-15] Indeed, Detective Needles recorded the conversation with the defendant

which was played for the jury. When asked by the detective if Grant's use of syringes to inject drugs was consistent with his instructions, the defendant replied: "No, no, he was lying to me. I mean, I would confront him. He said, gee I don't know, he'd come up with some bull shit story." [Gov't Ex. 27-2]. Sadly, Grant continued to receive prescriptions from the defendant, which he abused and sold until he was arrested on May 29, 2002. On that day, the defendant's conversation with Robert Woodson was recorded. They discussed Peter Grant. The defendant said: "I believe Peter's a punk . . . and irresponsible and . . . hangs around probably with some disreputable types and . . . and has been using cocaine because all his urine tests have come up positive for cocaine." [Gov't Ex. 10-6] Less than 10 hours after making that statement, the defendant issued a prescription to Peter Grant for large quantities of narcotics. The assessment note for Grant, dated May 29, 2002, was admitted into evidence proving the prescription had been issued. [Gov't Ex. 104-22] Later that evening, Grant was arrested for the third time that year, passed out in a 7/11 parking lot, engine running, a full syringe of Dilaudid resting on his leg, a passed out woman in the passenger seat and her a four year-old daughter asleep in the rear, amidst used syringes.

3. Robert Woodson [Counts 1 and 56 through 59].

Robert Woodson cooperated with the government and recorded many conversations with the defendant, who spoke freely and

easily about the drug dealers and drug addicts in his practice. Aside from the conversations about Peter Grant, the defendant spoke to Woodson about patients Patrick Snowden, Kevin Fuller, Tim Urbani and others. The defendant also spoke to Woodson freely about the police investigation of his practice and even encouraged patients, through Woodson, to enter into a conspiracy of silence. On August 28, 2002, Hurwitz said "SO, so I have kind of a huge **conspiracy of silence** because I, in fact, even, even knowing what I'll call the suspicious nature of you guys, assumed that you weren't stupid enough to - to not protect my practice and preserve your own - access to medications." [Gov't Ex. 15-7](emphasis added). Hurwitz laughed with Woodson when Woodson joked about Patrick Snowden, [Count 43], passing out in the waiting room. Snowden was issued prescriptions by the defendant at one time, for 1,600 Roxicodone pills per day. [Gov't Ex. 118-57] Snowden testified that he had been in eight to ten car wrecks while under Hurwitz' care. An emergency room doctor caring for Snowden said he had never seen such quantities before.

On the tape, the jury could hear Woodson tell the defendant that he had swapped OxyContin for cocaine before and the defendant calling Woodson "a smooth liar." [Gov't Ex. 10-4] Despite all of this evidence of abuse and diversion, the defendant continued to prescribe to Woodson. The defendant even suggested that Woodson get an MRI, saying "we've got to document

you up the kazoo . . . we have got to make sure that if somebody comes in here and says, how come you're giving him this guy was using cocaine and all these medicines . . ." [Gov't Ex. 11-3]

4. Kevin Fuller [Counts 1, 13 through 17].

Found in Kevin Fuller's medical file at the defendant's office, was a copy of an affidavit in support of a search warrant executed on Kevin Fuller's home by a state law enforcement officer. [Gov't Ex. 103-34] The affidavit, dated January 20, 2001, detailed a pattern of drug dealing activity taking place at Fuller's home and cited a number of sources who provided the information. The affidavit also referenced other patients like John Farmer [Counts 1 and 12] and Brett McCarter [Counts 1 and 28 through 30]. The affidavit stated that John Farmer had offered to go into the house and purchase drugs for the police. The affidavit also referenced that Brett McCarter had a long history of drug and violent crime criminal convictions. Despite all this knowledge, the defendant continued to issue prescriptions for excessive quantities of narcotics to Kevin Fuller, Brett McCarter, and John Farmer.

5. Tim Urbani [Counts 1 and 46 through 50].

In the Assessment note dated March 18, 2002, for Urbani, the defendant wrote "Patient reports that he was arrested on March 7 for "possession and attempt to re-sell" a Schedule II medication, while driving across the Tennessee-Virginia border." [Gov't Ex. 121-22] On April 12, 2002, Urbani responded to a routine question

about recent encounters with police since his last visit. He told the defendant "Yes - U.S. Marshalls charging me with conspiracy to commit robbery's on Plains and Boulevard [two local pharmacies]. [Gov't Ex. 121-25] Later, while recording the conversation, Urbani can be heard telling the defendant that despite his earlier denial, Urbani actually had sold pills in Tennessee. Despite all this knowledge, the defendant continued to prescribe powerful narcotics to Urbani until Urbani's arrest in July 2002.

C. Expert Testimony Regarding Pain Management Treatment.

The government called a number of expert witnesses at trial who relayed there opinions that defendant Hurwitz' prescriptions were not for a legitimate purpose and were beyond the bounds of medical practice.

1. Michael A. Ashburn, M.D.

Dr. Ashburn, a former President of the American Pain Society testified in painstaking detail how each of the prescriptions charged in the Indictment were simply beyond the bounds of medicine. Dr. Ashburn had reviewed thousands of pages of patient files and prepared a thorough report of his opinions well in advance of trial. Dr. Ashburn testified that a number of associations had set forth guidelines on how to prescribe opioids in the context of a pain management practice. He cited the Federation of State Medical Boards and the American Pain Society

as well as the Virginia Medical Society. He essentially boiled all of this information down to two common sense rules that the defendant had violated: 1) a physician must not prescribe narcotics to a patient that he or she knows is selling or distributing and 2) a physician must not prescribe narcotics to a patient he or she knows is abusing the medications, unless assistance from a substance abuse professional is sought to work along side the pain treatment professional. Two simple rules that the defendant could not, would not and refused to comply with. As the trial continued, it was clear the Dr. Ashburn's preparation, expertise and command for detail out shined every other expert that testified at the trial.

2. Robin Hamil-Ruth, M.D.

Dr. Hamil-Ruth is head of the University of Virginia's Pain Management program at Charlottesville, Virginia. She testified that there were hundreds of pain doctors and treatment centers located in the Washington, D.C. metropolitan area - debunking the defendant's claims that he was the doctor of last resort and that patients had no place else to go to. She also testified that her program was consistent with that of Dr. Ashburn. I.e. that patients who test positive for cocaine breach the agreement and are discharged after efforts to link them with a substance abuse professional. Dr. Hamil Ruth testified about the Virginia Intractable Pain Act, which allows for dosages above the recommended level as long as the physician prescribed in good

faith for accepted medicinal purposes or therapeutic purposes. Dr. Hamil Ruth was unequivocal. Clearly, prescribing narcotics to drug dealers and drug addicts are not justified by any accepted medicinal and therapeutic purposes.

3. Experts present by the Defendant.

The experts presented by the defendant at trial either presented such outlandish views that they simply lacked credibility or they supported the conclusions of the government. I.e. that defendant Hurwitz prescribing of narcotics was simply outside the bounds of medicine.

On cross-examination, C. Stratton Hill actually testified that it was appropriate for a doctor to prescribe narcotics to a person he or she knows is selling the medications. His opinion was a knowing advocacy for drug distribution by doctors and his credibility was non-existent.

Dr. Steven Pasik also supported the government's case in chief. On cross examination, Dr. Pasik acknowledged that the defendant's discussion of patient's care with other patients was a gross abuse of patient confidentiality. Dr. Pasik acknowledged that it would be inappropriate for a physician to request an MRI on a patient only for purposes of explaining why he was issuing such huge prescriptions of opioids to patient he knew was abusing cocaine. Time and time again, Dr. Pasik was presented with specific examples of the defendant's knowledge of drug dealing and drug abusing patients and Dr. Pasik agreed that writing

prescriptions in those instances were simply not for a legitimate medical purpose and beyond the bounds of medicine.

D. Fatal And Non-Fatal Overdoses [Counts 2, 5 and 6].

Overwhelming evidence was also presented regarding the defendant's prescribing of lethal doses of opioids to persons who fatally (Linda Lalmond) and non-fatally overdosed (Carl Shortridge and Mary Nye) while taking prescription narcotics issued by the defendant. The most egregious was the story of Linda Lalmond. Within 36 hours of meeting Dr. Hurwitz, she was dead of an overdose of morphine. Dr. Carol O'Neil, forensic toxicologist, testified that the level of morphine found in Mrs. Lalmond's blood was the 5th highest out of 150 morphine related deaths over the past five years in Northern Virginia. Dr. O'Neil also testified that this morphine blood level was consistent with the both the amount the defendant had prescribed and the amount the evidence showed she had taken. Other significant evidence relative to the overdoses of Carl Shortridge and Mary Nye was submitted to the Jury.

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ARGUMENT

I. Motion For Judgment Of Acquittal.

In deciding a motion for judgment of acquittal under Fed. R. Crim. P. 29, this Court must view the evidence in the light most favorable to the United States and "not weigh the evidence or review the credibility of the witnesses." United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997) (citations omitted).

In the case at bar, such a motion should be denied in light of overwhelming evidence described above. Even the defendant's own experts testified that his prescriptions were not for a legitimate medical purpose and beyond the bounds of medicine. In light of the evidence referenced above, it was clearly established that the defendant issued prescriptions that he knew were abusing and diverting the pills. The additional witnesses not discussed above, such as family members of patients and law enforcement officers, each of whom testified that they stated that they had contacted the defendant and complained about the abuse and diversion of his patients only served as added evidence to seal the convictions against the defendant.

II. Motion For A New Trial.

Although a new trial may be granted if the verdict is against the weight of the evidence, this Court "should exercise its discretion to grant a new trial 'sparingly'" and "'only when the evidence weighs heavily against the verdict.'" Id. at 237 (quoting United States v. Arrington, 757 F.2d 1484, 1486 (4th

Cir. 1985)).

The defendant has not set forth any articulable basis for a new trial. The Court properly instructed the jury as to the elements of a charge of drug distribution when it relates to prescriptions of controlled substances issued by a physician. The Court appropriately refrained from issuing an instruction involving good faith. The government is not required to make a showing that the physician prescribed controlled substances for an illegitimate purpose. U.S. v. Hitzig, 2003 U.S.App. LEXIS 7012 (4th Cir. 2003)(Unpublished); See also, U.S. v. Singh at 1188. In other words, it is sufficient to prove a physician prescribed controlled substances while acting outside the bounds of medicine regardless of whether he had a good faith belief that he was fulfilling a legitimate medical purpose.

Next and despite the defendant's allegations otherwise, there is no requirement for the government to allege Aiding and Abetting in the Indictment in order for the Court to instruct the Jury on the ability to convict a defendant on the principle crime if he aided and abetted the violation. See United States v. Duke, 409 F2d 669, 671 (4th Cir. 1969) and United States v. Horton, 921 F.2d 540 (4th Cir. 1990).

In addition, the defendant was allowed to call five patients whose conduct was not charged in the Indictment. The government had filed a motion in limine asking the Court to prevent the defendant from calling any patients not listed in the Indictment

arguing that these patients were not relevant to the charges contained in the Indictment and improper bolstering of the defendant's character. Nevertheless, the Court allowed the defendant to call five of these patients and granted the government the opportunity to call five additional patients not listed in the Indictment during its rebuttal case. Regardless, the defendant now argues that he should have been allowed to call additional witnesses that were not relevant to the charged offenses. The Court's limitation of these witnesses at trial was appropriate and completely within its discretion to limit the scope and mode of the presentation of evidence during the course of a trial, as provided in Fed. R. Evid. 611.

In sum, the defendant has not provided any articulable basis for the granting of his request for a new trial.

III. Motion That The Attorney General Lacks Jurisdiction To Charge Physicians Who Violate The Controlled Substances Act.

The defendant's allegation related to jurisdiction was answered in United States v. Moore, 423 U.S. 122 (1975), in which the Supreme Court ruled that physicians were not exempt from prosecution under the Controlled Substances Act. Id. at 138-40. The defendant's allegations regarding jurisdiction are a direct

attempt to re-litigate a matter long resolved by the Supreme Court.

CONCLUSION

For the foregoing reasons, the defendant's motions should be denied.

Respectfully submitted,

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By:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing AMENDED
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